No. 78-64

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee, the United States of America, moves that the judgment of the district court be affirmed.

STATEMENT

This is an appeal under 28 U.S.C. 1254(2) from the judgment of the court of appeals holding that a veteran's estate that vests in the United States under 38 U.S.C. 5220(a) cannot be constitutionally subject to estate taxation by the State of New York.

The pertinent facts are as follows:

The decedent, Charles Brown, a resident of New York, served in the United States Navy from November 1918, to January 1919 (J.S. App. 2a). On October 11, 1972, he was admitted to the Veterans' Administration Hospital in Bronx, New York, for treatment of a heart ailment, and died

on March 5, 1973, while a patient at the Hospital (J.S. App. 3a). Brown died intestate, and left no next of kin entitled to inherit under New York law (J.S. App. 2a-3a).

The decedent left an estate of $68,690.00 after deductions for funeral and administration expenses. The bulk of his estate consisted of four bank accounts held jointly with Gertrude Farrington, a friend of the decedent. However, the estate also included $7,066.76 worth of personal property not held jointly, title to which vested in the United States under 38 U.S.C. 5220(a). The administrator computed and paid both federal and state estate taxes on the entire $68,690.00 estate (J.S. App. 3a).

On April 26, 1974, the United States filed an objection in the New York Surrogate's Court to the payment of New York estate tax on the $7,066.76 of property that vested in the United States under 38 U.S.C. 5220(a) (J.S. App. 3a). After removal of the case to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. 1441, the district court held that New York could not constitutionally tax property that vested in the United States under 38 U.S.C. 5220(a) (J.S. App. 8a-12a).

The court of appeals affirmed (J.S. App. 1a-7a). As the court observed, 38 U.S.C. 5220 provides that "all * * * property * * * owned by [the deceased veteran who dies intestate and without next of kin] * * * shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund" (J.S. App. 5a). Congress' purpose in enacting the statute was to supply greatly needed funds for the General Post Fund, and benefit those ex-service personnel confined to veterans' homes and hospitals. The court of appeals therefore concluded: "In light of the statute's express wording and the purpose of the statute, we hold that § 5220 precludes state taxation on property passing to the United States under § 5220" (footnote omitted) (J.S. App. 6a).

ARGUMENT

The court of appeals correctly held that New York could not constitutionally impose its estate tax upon property of an intestate veteran with no next of kin vesting in the United States pursuant to 38 U.S.C. 5220.

1. Section 5220(a) provides that when a veteran dies intestate without any next of kin while a patient in a Veterans' Administration hospital, his property that is not disposed of by will or otherwise "shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund * * *." As this Court explained in *United States* v. *Oregon*, 366 U.S. 643, 647 (1961), the purpose of Congress in enacting this statute was to supply greatly needed funds for the General Post Fund, which provides recreation to ex-service personnel confined to veterans' homes and hospitals. There, the Court upheld the statute as a constitutional exercise of Congress' power to make all laws necessary and proper to raise and support armies and rejected the claim by the State of Oregon that the statute impermissibly preempted escheat of a deceased veteran's property to the State. In so holding, the Court noted (*id.* at 648-649) that during the House floor debate on the bill Representative Jennings observed that it would "be much better to let that money go into a fund that would inure to the benefit of other veterans than to let * * * it go into a fund under the escheat laws of [a] State" (87 Cong. Rec. 5203-5204 (1941).

Recognizing the controlling force of *United States* v. *Oregon, supra,* appellant (J.S. 17) asks this Court to reexamine its decision in that case. But none of the subsequent cases cited by appellant (J.S. 17-21) casts doubt upon the vitality of that precedent. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), upon which appellant relies (J.S. 19-20), the Court held that a federal statute that established minimum wages and maximum hours of state

employees was unconstitutional on the ground that such restrictions would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (426 U.S. at 851-852). Here, however, the limited exemption from state taxation of funds passing to the General Post Fund does not interfere with the functioning of state governments[1] (see J.S. App. 7a n.6). As the Court stated in *United States* v. *Oregon*, *supra*, 366 U.S. at 648-649 (footnotes omitted):

> Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals and homes for veterans. We think it plain that the same sources of power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people who must depend upon the Government for care. The fact that this law pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary, and proper to the exercise of a delegated power. [2]

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[1] *Trimble* v. *Gordon*, 430 U.S. 762 (1977), upon which appellant relies (J.S. 20-21), is inapposite. There, the Court struck down a provision of the Illinois Probate Act that barred illegitimate children from inheriting their fathers' estates by intestate succession. But *Trimble* turns on the Equal Protection Clause and does not involve the impact of a federal statute upon the devolution of intestates' property.

[2] Appellant further argues (J.S. 21-22) that 38 U.S.C. 5220 does not apply to the decedent in this case because he was over the age of 65, and eligible to receive free care at a Veterans' Administration facility under 38 U.S.C. 610(a)(4). But nothing in Section 5220 precludes the application of that provision to the estates of veterans who live beyond age 65.

2. Although the court of appeals did not address the question, the New York estate tax statute, properly construed, would permit a deduction for the amounts paid over to the General Post Fund pursuant to 38 U.S.C. 5220. Hence, the New York estate tax would not reach amounts from the estates of deceased veterans that vest in the United States. The judgment below can therefore be affirmed on this alternative statutory ground.

The pertinent New York statute (J.S. 3) provides that the New York estate tax deductions "mean the deductions from [the] federal gross estate allowable in determining [the] federal taxable estate under the internal revenue code * * *." N.Y. Tax Law § 955 (McKinney 1975). Under Sections 2053 and 2055 of the 1954 Code, a deduction is allowed for charitable pledges, and the Internal Revenue Service has ruled (Rev. Rul. 75-533, 1975-2 Cum. Bull. 359) that property passing to the United States under 38 U.S.C. 5220(a) is deductible as a charitable pledge from the gross estate of the deceased veteran. Hence, the amount would likewise be deductible under Section 955 of the New York Tax Law.

Appellant argues (J.S. 15) that the Commissioner's ruling is erroneous and should not govern the construction of New York law. But given the New York statutory policy of conforming its estate tax law to the federal estate tax, there is no basis for such a contention.

In re Estate of O'Brine, 37 N.Y. 2d 81, 332 N.E. 2d 326, 371 N.Y.S. 2d 453 (1975), upon which appellant relies (J.S. 10), does not contradict this statutory analysis and does not signal disapproval of Rev. Rul. 75-533 by the New York Court of Appeals. That case involved a transfer under a different statute (38 U.S.C. 3202(e)), which provides for an "escheat" to the United States of property owned by an intestate veteran who dies without

heirs, where such funds are derived from Veterans' Administration benefits. In holding that New York estate taxes could be imposed on the transferred funds, the court interpreted the federal statute in light of the New York law of abandoned and escheated property. Here, however, the transfer was not an escheat under New York law but was an immediate vesting in the United States that also qualified as a charitable pledge. Indeed, in ruling that the escheat was subject to New York estate taxation, the court in *O'Brine* specifically noted that in the computation of the New York "taxable estate," no deduction is allowed for "escheat" (as distinguished from "bequests, legacies, devises or transfers") either to the State or to the United States (see 37 N.Y. 2d at 85, 332 N.E. 2d at 329, 371 N.Y.S. 2d at 457).[3]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General

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[3]The fact that title to the property vested in the United States by operation of a federal statute distinguishes this case from *United States* v. *Perkins*, 163 U.S. 625 (1896), upon which appellant relies (J.S. 11), where a bequest to the United States was held to be subject to estate taxation by a state.

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